who leases INTELSAT capacity from the foreign signatory would be a reseller. Similarly, a U.S. carrier who leases capacity from a separate satellite system would be facilities-based, but apparently a foreign carrier who leases the matching foreign half-circuit from a separate satellite system would be a reseller.

The Notice provides two rationales for adopting a narrower definition of facilities-based carrier for foreign half-circuit providers. First, the Commission seeks to avoid an "undesirable increase in the settlements deficit."[35] Second, the Commission desires to avoid "implicitly encourag[ing] foreign countries to stop short of creating full facilities-based competition by appearing to legitimize limiting competition to . . . leased circuits."[36] As shown below, neither rationale withstands scrutiny. The principal effect of adopting a narrower definition of facilities-based carrier for foreign half-circuit providers would be to preclude U.S. carriers from entering newly-opened foreign telecommunications markets, thereby suppressing competition and propping up above-cost accounting and collection rates. This is the opposite of what the Commission desires to accomplish in this proceeding, and it would directly undermine the efforts of the U.S. Government and Vice President Gore to promote a forward-looking Global Information Infrastructure around the world.

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35 Id.

36 Id.

1. <u>Closing Foreign Markets</u>. Treating "foreign leased circuits" as resale activities subject to the IPL resale policy would close foreign markets to U.S. carriers and undermine competition in the U.S. market. Foreign countries often introduce competition into their telecommunications markets in uneven increments (rather than on a flash-cut basis) one market segment at a time. Providing IPLs over leased capacity is normally among the first competitive activities to be authorized. By regarding carriers who enter foreign IPL markets by leasing bulk capacity as resale carriers, the Commission would preclude U.S. carriers from entering some newly-opened markets whose opportunities are not yet "equivalent" to those available in the United States. Such artificial restrictions on U.S. entry into foreign markets are directly contrary to the Commission's stated goals in this proceeding and the Administration's GII policy.

Ironically, the principal beneficiaries of expanding the IPL resale policy to encompass "foreign leased circuits" would be monopoly and duopoly foreign carriers. The proposed definition would benefit foreign PTTs by keeping U.S. carriers from entering their markets and competing against their above-cost collection rates for switched and IPL services. Foreign monopoly and duopoly carriers would be permitted to provide IPL interconnection consistent with the Commission's IPL resale policy because they would own the underlying facilities and, therefore, they would qualify as facilities-based carriers. By contrast, new entrants seeking to provide the exact same IPL interconnection service (including the affiliates of U.S. carriers) would be regarded as resellers because they would lease rather than own the underlying foreign half-circuit capacity. As a consequence, they would be prevented from providing IPL interconnection service except in those few countries which satisfy the Commission's "equivalency" policy. The direct result of the Commission's proposed definition of "foreign leased circuits" as a resale activity would be to discriminate in favor of foreign PTTs and against U.S. carriers seeking to enter foreign markets. (The diagram attached to these comments as Exhibit 1 illustrates how the Commission's proposed definition would discriminate between virtually identical services to the detriment of U.S. entrants into the foreign market.)

By defining "foreign leased circuits" to be a resale activity subject to the IPL resale policy, the Commission would substantially curtail the IPL interconnection opportunities which are available today to U.S. multinational corporations. Indeed, such a definition would disrupt existing IPL interconnection configurations which were implemented based upon well-settled Commission precedent. The definition proposed in the Notice would make customers dependent upon foreign PTTs for IPL interconnection services other than PBX interconnection which the customers can implement in their own U.S. offices.[37] Monopoly and duopoly foreign carriers have dragged their feet when introducing IPL

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37 U.S. business customers would be able to implement central office interconnection only if they undertook, by themselves, to arrange for the matching U.S. and foreign IPL half-circuits. Because it is unrealistic in the real world to expect customers to arrange their own IPL arrangements, the practical effect of regulating "foreign leased circuits" as a resale activity would be the elimination of central office interconnection from the marketplace.

interconnection services, and many do not offer such services at all. The reason is that such carriers desire business customers in their countries, including the offices of U.S. companies, to use expensive direct dial services to the maximum extent possible. Therefore, were the Commission to make U.S. business subscribers dependent upon foreign PTTs for IPL interconnection at a carrier's central office, central office interconnection would largely disappear as an option for those customers.

It bears emphasis that the Commission's current policy, as articulated in CC Docket No. 90-337, is to permit U.S. business customers in engage in facilities-based IPL interconnection through central office interconnection. That policy would be effectively overturned if the Commission defined all "foreign leased circuits" to be a resale activity subject to the IPL resale policy. In so doing, the Commission would have effectively granted AT&T's petition for reconsideration in CC Docket No. 90-337, Phase II, seeking an expansion of the IPL resale policy to prohibit IPL interconnection at carriers' central offices.

The issue whether the U.S. should forego market opening opportunities in foreign countries that fall short of a flash cut to unrestricted market access arose in the proceeding (Docket No. 921251-2351) initiated by the National Telecommunications and Information Administration ("NTIA") in 1993 to review the U.S. Government's international telecommunications policies. The position of the International Trade Administration in that proceeding is instructive:

> "The [U.S. Government] should support the interests of U.S. telecom carriers in gaining access to foreign service markets, whether this is accomplished through resale of private lines, ownership of telecom facilities, joint ventures, or other business arrangements."[38]

The U.S. business community agreed with this approach. In its comments to NTIA, IBM noted:

> "[U.S. Government] policy should be to promote not only facilities-based competition but also competition in the provision of all forms of basic services that are based on the operators' facilities and their regulated and reserved services. . . . The development of services-based basic competition [e.g., IPL resale] can provide immediate benefits to U.S. companies even if many countries continue to delay the introduction of facilities-based competition for some time."[39]

IBM reiterated:

> "To maximize opportunities for both U.S. users and service providers, the [U.S. Government] should strongly support progress toward open competition in the provision of all types of international telecommunications services, to and from the United States and between and within other countries. Specifically, efforts to introduce more competition abroad should focus attention not only on opportunities to open up facilities-based competition, but equally on promoting open opportunities for all forms of services-based basic competition."[40]

The Coalition of International Telecommunications Users may have said it best: "[T]he United States should aggressively pursue the

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38 Comments of Office of Telecommunications, International Trade Administration, U.S. Department of Commerce, NTIA Docket No. 921251-2351, filed April 20, 1993, at 2.

39 Comments of IBM Corporation, NTIA Docket No. 921251-2351, Filed April 20, 1993, at iii & iv.

40 Id. at 7-8 (emphasis supplied).

liberalization of the international services marketplace wherever and whenever the opportunities arise." [41] By seizing even limited market entry opportunities in foreign countries, U.S. carriers can help achieve the Commission's broader goal of achieving open entry in foreign markets. IPL interconnection imposes downward pressure upon above-cost foreign collection and accounting rates.

There is no record basis to conclude that "foreign leased circuits" would benefit foreign carrier or customer interests disproportionately. From the carrier side, the principal beneficiaries are U.S. IPL carriers and the foreign half-circuit providers of IPLs over leased capacity. In countries (such as the U.K. and Germany) which do not discriminate against U.S. carriers entering the IPL market via leased capacity, the provision of IPL interconnection over "foreign leased circuits" does not favor foreign interests.

As regards end users, IPL interconnection services benefit the U.S. business community with operations or offices abroad. The Notice recognizes (at ¶ 20) that over 40% of the world's multinational corporations are headquartered in the U.S. As a result, any service that benefits multinational corporations will, by definition, benefit the U.S. business community. IDB's experience as an IPL provider affirms that many if not most companies which take advantage of IPL interconnection are U.S.

41 See Comments of Coalition of International Telecommunications Users, NTIA Docket No. 921251-2351, filed April 20, 1993, at 9.

companies doing business overseas,[42] and the U.S. business community has strongly opposed all efforts to curtail IPL interconnection. It is a myth that IPL interconnection benefits foreign business interests at the expense of U.S. carriers and subscribers.

2. Net Settlements Imbalance. IDB recognizes that the Commission adopted the IPL resale policy, at least in part, to prevent increasing the U.S. net settlements imbalance through one-way resale. While IDB does not here ask the FCC to re-visit the rationale underlying the policy, IDB submits that the Commission's and the industry's understanding of the settlements process is far more sophisticated today than in 1991.[43] It is no longer true, if it ever was, that services which increase the settlements imbalance, however minimally, inherently undermine the U.S. public

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42 The record in CC Docket No. 90-337, Phase II, confirms that many if not most companies taking advantage of IPL interconnection are U.S. companies doing business overseas. E.g., Comments of IDB, CC Docket No. 90-337, Phase II, filed Feb. 12, 1993, at 13; Opposition of American Petroleum Institute, CC Docket No. 90-337, Phase II, filed Mar. 23, 1992, at 6; Opposition of the Coalition of International Telecommunications Users, CC Docket No. 90-337, Phase II, filed Mar. 23, 1992, at 3 n.5, 7 & 10-11; Letter from Coalition of International Telecommunications Users to D. Searcy, FCC (Sept. 8, 1992) at 2 (submitted on record in CC Docket No. 90-337, Phase II).

43 IDB has presented its views on this issue numerous times in CC Docket No. 90-337. E.g., "Response of IDB Communications Group, Inc.," CC Docket No. 90-337, Phase II, filed April 14, 1994 [hereinafter "IDB Response"]; "Supplemental Comments of IDB Communications Group, Inc.," CC Docket No. 90-337, Phase II, filed Sept. 21, 1993 [hereinafter "IDB Supplemental Comments"]; "Comments of IDB Communications Group, Inc.," CC Docket No. 90-337, Phase II, filed Feb. 12, 1993 [hereinafter "IDB Comments"]. IDB hereby incorporates those submissions into the record in this proceeding.

interest. Even AT&T no longer defends that proposition.[44] Available data show that the size and growth of the settlements imbalance is related to the U.S. public interest, if at all, only by coincidence. As a result, the Commission should not broaden the IPL resale policy by defining "foreign leased circuits" as a resale activity solely to reduce the settlements imbalance. Instead, the Commission must undertake a broader inquiry to determine whether permitting U.S.-based carriers to provide IPL interconnection in foreign countries over leased bulk capacity promotes the U.S. public interest.

Country direct and country beyond services[45] repudiate the theory that services which increase the net settlements imbalance are inherently contrary to the public interest. All parties agree that country direct and country beyond services contribute directly and substantially to the size and growth of

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44 See AT&T Supplement, NTIA Docket No. 921251-2351, filed April 20, 1993, at 22 ("In determining U.S. policy, it is important to recognize that the absolute level of settlements outpayments is not, in itself, troublesome. In fact, the growth of U.S.-billed minutes is indicative of the vibrant and growing information services sector of the U.S. economy.").

45 Country direct services, such as AT&T's USADirect services, transform calls that originate in foreign countries into U.S.-billed traffic for settlement purposes. By increasing U.S.-billed minutes and decreasing foreign-billed minutes at the same time, these services increase the settlements imbalance by design. Country beyond services permit callers in foreign countries to place calls to other foreign countries through a U.S. carrier. These calls increase the settlements imbalance by generating two outpayments by the U.S. carrier which would not have occurred otherwise.

the U.S. net settlements imbalance.[46] The proportion of the imbalance attributable to country direct and country beyond services is subject to debate. Based upon AT&T-supplied data and a disclosed methodology and calculations, IDB estimated that 30-40% of the settlements imbalance in 1991 resulted from country direct services alone,[47] and that as much as 50% of the imbalance reflected country direct and country beyond services together.[48] By contrast, AT&T has estimated that country direct services cause less than 10% of the settlements imbalance while declining to disclose its calculations or methodology.[49] To IDB's knowledge, AT&T has not publicly estimated the impact of country beyond services upon the settlements imbalance. Nevertheless, whether IDB's or AT&T's estimate is closer to the mark, there is no

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46 Reverse-origination services, known in the industry as call-back services, also increase the U.S. settlements imbalance. The Commission found such services to be consistent with the U.S. public interest in VIA USA, Ltd., 9 FCC Rcd 2288 (1994).

47 See IDB Comments at 11 & n.16. In response to AT&T's downward revision of its estimate of country direct minutes in 1991, IDB re-calculated the figure at 30%. IDB Response at 6 & nn. 10-11. Given the growth in country direct services since 1991, it is likely that such services reflect an even greater proportion of the U.S. net settlements imbalance now than in 1991.

48 See IDB Supplemental Comments at 8.

49 "Supplemental Comments of American Telephone and Telegraph Company on Third Further Notice of Proposed Rulemaking," CC Docket No. 90-337, Phase II, filed Nov. 30, 1993, at 12; see also IDB Response at 5-7. AT&T has resisted complying with the Commission's order that it submit data on the settlements impact of country direct services. E.g., Letter from E. McHale, AT&T, to D. Searcy, FCC (Jan. 4, 1993) at p. 2 (refusing to provide data on USADirect on grounds that such data are proprietary and would not adequately take into account foreign country direct services or cross-elasticity of demand).

dispute that country direct and country beyond services have a far more substantial impact upon the U.S. net settlements imbalance than IPL interconnection at the U.S. end and/or the foreign end.[50]

The Commission cannot codify the IPL resale policy to include "foreign leased circuits" as a means of reducing the size and growth of the U.S. settlements imbalance without explaining why country direct and country beyond services are lawful despite their much larger adverse impact upon the settlements imbalance. IDB believes that no such explanation is possible. In fact, IPL interconnection promotes the public interest in ways that are nearly identical to country direct and country beyond services.

- Just like country direct service, IPL interconnection causes an increase in revenues for U.S. carriers, namely, U.S. IPL carriers and U.S. companies who enter foreign markets to provide the foreign half-circuit.

- Just like country direct service is alleged to do, IPL interconnection stimulates growth in international traffic through lower collection rates.

- Just like country direct services, IPL interconnection benefits end users by permitting them to avoid excessive IDD collection rates of foreign monopoly and duopoly carriers.

- Just like country direct and country beyond services, which benefit U.S. citizens

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50 It bears emphasis that the <u>Notice</u> cites no evidence, nor is there any evidence in the record, identifying any increase in the U.S. net imbalance that would result from applying the same definition of facilities-based carrier to U.S. and foreign carriers. The Commission has not even analyzed the impact, if any, of adopting a uniform definition of facilities-based carrier upon total revenues for U.S. carriers (both IPL and IMTS) or collection rates for U.S. end users.

travelling overseas, IPL interconnection benefits U.S. firms doing business overseas.

The arguments generally lodged against services which increase the settlements imbalance apply with equal force to country direct and country beyond services. For example, AT&T has argued that 50% of any increase in the settlements imbalance represents a foreign subsidy. If true, then 50% of the massive increase caused by country direct and country beyond services represents a foreign subsidy.[51] It also has been argued that a higher settlement imbalance undermines the public interest by leading to higher U.S. collection rates. This argument is factually wrong. FCC experts have concluded that there is no relationship between the size and growth of the settlements imbalance and U.S. collection rates.[52] But even if the argument were factually based, it would apply equally to country direct and country beyond services. In short, there is no reasonable basis upon which "foreign leased circuits" may be restricted for allegedly increasing the U.S. net settlements imbalance while

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51 In fact, AT&T has admitted that "country direct services [bear] above-cost subsidies of nearly 50%." <u>See</u> "Reply Comments of AT&T," NTIA Docket No. 921151-2351, filed May 28, 1993, at 20.

52 <u>See</u> Kenneth B. Stanley, "Balance of Payments, Deficits, and Subsidies in International Communications Services: A New Challenge to Regulation," 43 <u>Administrative Law Review</u> 411, 426, 427 (Summer 1991) (concluding that there is "no apparent relationship between [IMTS] prices and [accounting] rates" and that "there is little correlation between the reductions in [IMTS] prices and accounting rates"). The Commission's international statistics show that the settlements imbalance increased from $1.5 billion in 1986 to $3.4 billion in 1991, while U.S. collection rates showed no material increases or decreases during that time period. <u>See</u> <u>IDB Comments</u> at 8-9.

distinguishing country direct and country beyond services despite their much larger impact upon the imbalance.

3. <u>What Message Is Being Sent To Foreign Countries</u>? Applying the Commission's proposed definition to foreign carriers on a non-discriminatory basis would not send an improper signal to foreign countries. To the extent the Commission is sending a signal, it is through the proposed effective market access policy. In order to avoid any confusion, were the Commission to adopt the proposed effective market access policy, it could underscore that it contemplates foreign countries opening their markets to full facilities-based <u>ownership</u> of the underlying transmission facilities by U.S. carriers at the foreign end. Such a policy would put foreign countries on notice that the U.S. does not regard the leasing of facilities as sufficient facilities-based competition to justify the entry of foreign carriers into the U.S. market under normal circumstances. With respect to the IPL resale policy, the Commission could state that the underlying definition of facilities-based carrier does not reflect the Commission's view of the minimum acceptable degree of market openness.

In any event, the Commission should not let terminology dictate the scope and application of a substantive Commission policy. There certainly is no reason to adopt a non-uniform definition of facilities-based carrier which keeps U.S. carriers out of foreign markets under the IPL resale policy. If the Commission seriously believes that applying the same definition to U.S. and foreign carriers will send the wrong signal as to the extent of market openness which the U.S. Government will accept, the Commission could simply withdraw the term "facilities-based" (or use some other term) when describing those carriers not subject to the IPL resale policy. The Commission has already described the U.S. carriers who would be outside the policy in functional terms, and it could construct similar categories for the foreign half-circuit providers without designating them facilities-based or resale carriers.

4. <u>"Maximum Interest" Approach</u>. In terms of fashioning a non-discriminatory definition applicable to the foreign half-circuit provider, the Commission should use the "maximum interest" approach proposed in IDB's rulemaking petition. By placing U.S. carriers leasing capacity from Comsat outside the policy, the Commission has shown that carriers who obtain the maximum interest in the underlying facilities permitted by law should not be subject to IPL interconnection restrictions. Neither the Commission nor any party has identified one reason why U.S. carriers leasing capacity from Comsat should be treated differently than foreign carriers (including affiliates of U.S. carriers) who lease capacity from the monopoly or duopoly carriers in their own countries. The "maximum interest" approach is an accurate and administratively efficient mechanism to apply the Commission's definition for U.S. carriers to the foreign half-circuit providers on a non-discriminatory basis.

Even if the Commission does not expressly apply the "maximum interest" approach, it should make clear that foreign carriers are outside the IPL resale policy if they operate in the same manner as a U.S. carrier who falls outside the policy. For example, a foreign carrier who leases capacity from its monopoly INTELSAT signatory, from a separate satellite system, or from a non-common carrier submarine cable operator should qualify as a facilities-based carrier who is exempt from the Commission's IPL resale policy. Once the Commission clarifies the carriers to whom the policy applies, the clarification should be applied on a prospective basis only and the affected carriers should be given sufficient time to review their operations to be certain that such operations are consistent with the Commission's new policies.

5. U.S. Carrier Entry. At a minimum, the Commission should ensure that its IPL resale policy does not obstruct U.S. carriers from entering newly-opening foreign markets. If the Commission declines to adopt a uniform definition of facilities-based carrier, IDB recommends that the Commission adopt a definition under which affiliates of U.S. companies are regarded as facilities-based carriers, and hence outside the IPL resale policy, when they provide IPL interconnection services in foreign countries. Certainly, there can be no doubt that U.S.-affiliated companies come from a country with an open telecommunications market, nor can there be any doubt that the benefits of the IPL interconnection services offered by U.S. companies in foreign markets will primarily benefit U.S. interests. Also, permitting U.S. companies to enter foreign markets would promote the Commission's objective of opening foreign markets, and it would

ensure that U.S. multinational customers will continue to have the same access as today to services offering IPL interconnection at a carrier's central office. Therefore, rather than throw out the baby with the bathwater, if the Commission decides to regulate "foreign leased circuits" as a resale activity, it should establish an exception whereby U.S.-owned foreign carriers are defined to be facilities-based carriers and, therefore, eligible to provide IPL interconnection services in newly-opening foreign markets.

V. THE FCC SHOULD NOT EXPAND THE IPL RESALE POLICY TO APPLY TO SINGLE-END FOREIGN RESALE

The issues regarding the definition of a facilities-based carrier would be less controversial were the Commission to clarify that the IPL resale policy does not apply to single-end foreign carrier activities. It is only if the Commission expands the policy to include single-end foreign resale, either directly by regulating the foreign half-circuit provider or indirectly by imposing separate Section 214 requirements upon U.S. carriers when IPL resale occurs at the foreign end, that the question of defining a facilities-based carrier becomes of paramount importance. IDB submits that there are sound policy reasons, and mandatory legal reasons, not to expand the IPL resale policy to single-end foreign resale.

At the outset, the Notice laid no factual or policy groundwork for modifying the IPL resale policy to apply to single-end foreign carrier activities. The Notice does not suggest that the current IPL resale policy is ineffective or offer any reasons why the proposed modifications promote the public interest. The record contains no data on the frequency with which single-end foreign resale occurs, the countries in which it occurs, the volume of traffic affected, or the impact, if any, upon U.S. consumers. The Notice completely ignores the negative impact of expanding the policy, and in particular how it would undermine the goals of promoting competition and opening foreign markets. The Notice recognized (at ¶ 68 n.55) IDB's contention that the Commission lacks jurisdiction over single-end foreign activities, but it failed to resolve that and other legal issues implicated by the proposed codification. IDB submits that, after conducting the requisite de novo review of the proposed IPL resale policy, the Commission will conclude that expanding the policy would defeat its established international telecommunications policies.

A. Policy Issues.

The same policy reasons that militate in favor of a non-discriminatory definition of facilities-based carrier also argue against expanding the IPL resale policy to encompass single-end foreign resale. By clarifying that the policy does not extend to single-end foreign resale, the Commission would enable U.S. carriers to enter newly-opening foreign telecommunications markets, thereby enhancing competition in foreign countries, lowering switched and IPL collection rates in those countries, and imposing downward pressure on accounting rates. In addition, the Commission would ensure that U.S. multinational customers have access in fact as well as in theory to the kinds of IPL interconnection configurations which they employ today. Any attempt by the Commission to control or proscribe single-end foreign carrier activities would have a boomerang effect on U.S. carriers and multinational corporations without offsetting benefits.

The Commission's apparent proposal to expand the IPL resale policy to include single-end foreign resale may reflect some confusion between so-called "one-way resale" and "single-end" IPL resale. The designations "one way" and "two way" refer to the direction in which traffic flows over an IPL. Often, an IPL interconnected to the PSN at only one end will result in "one-way" traffic, while an IPL interconnected to the PSN at both ends will result in "two-way" traffic. By contrast, the term "single-end" refers to a situation where the resale activity occurs only at one end of an interconnected IPL. Whether an interconnected IPL involves "one-way" or "two-way" traffic has no bearing upon whether "single-end" resale is involved. For example, it is possible to have "one-way" IPL interconnection where there are no single-end resale activities, just as it is possible for a "two-way" IPL interconnection service to be provided in a configuration where resale occurs only at one end.[53]

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53 For the former, both the U.S. and foreign half-circuits could be provided by facilities-based carriers, while PSN interconnection is permitted only on the U.S. end. This would be an example of facilities-based one-way IPL interconnection, which is permissible under the Commission's current rules. As for the latter, either the U.S. and foreign half-circuit would be provided on a resale basis, but PSN interconnection would occur at both ends, thereby constituting an example of two-way IPL interconnection

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The Commission should not expand the IPL resale policy to single-end foreign resale activities under the mistaken belief that such activities embody the "one-way resale" that the policy was designed to encompass. The Commission should recognize that it adopted the IPL resale policy to prohibit some, but not all, types of one-way IPL interconnection. There are at least four different one-way IPL interconnection configurations: (i) resale activities at both ends; (ii) resale activities at the U.S. end only; (iii) resale activities at the foreign end only; and (iv) no resale activities at either end (i.e., an end-to-end facilities-based service). When it adopted the IPL resale policy in 1991, the Commission did not intend the policy to apply to facilities-based one-way IPL interconnection. Rather, the Commission intended to proscribe "one-way resale," and it stated time and again that the policy applied only to "one-way resale" of U.S.-based carriers' IPLs. It is not necessary to apply the policy to single-end foreign resale activities in order to effectuate the Commission's original intent in adopting the policy.

B. Legal Issues.

The Commission cannot apply the IPL resale policy to single-end foreign carrier activities, either directly or through Section 214 requirements imposed upon U.S. half-circuit providers, without resolving the attendant legal issues.

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involving single-end resale activities. There is no policy, logical or technical connection between whether an IPL interconnection is "one way" and whether it involves "single-end" resale activities.

1. Jurisdiction. Historically the Commission has applied the half-circuit theory of jurisdiction whereby its jurisdiction under the Communications Act extends only to the "theoretical midpoint" between the U.S. and the foreign country.[54] The activities of foreign carriers at the foreign end subject to regulation by foreign authorities are wholly outside the Commission's jurisdiction.[55] Similarly, the law creates a presumption that Congress intends legislation to apply only within United States territory in order to prevent "outright collisions between domestic and foreign law."[56] Absent express authority in the Communications Act to regulate the activities of foreign

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54 E.g., FCC Manual at 10-11 & n.13; AT&T Co., 98 FCC 2d 440, 462 (1984).

55 E.g., GTE Telenet Communications Corp., 100 FCC 2d 776, 799 (1985) (holding that the FCC's Computer II policy applies to enhanced services only if the enhancements occur at the U.S. end); see also AT&T Co., 98 FCC 2d 440, 461 (1984) ("[t]he power exercised by each PTT results from its sovereign authority over the telecommunications system within its borders"); Regulation of International Communications Carrier Services, 7 FCC Rcd 7331, 7335 n.66 (1992) ("our jurisdiction flows to the U.S. carrier, not to its foreign affiliate"); Cable and Wireless Communications, Inc., 2 FCC Rcd 1186, 1187 (1987) (Common Carrier Bureau) (recognizing lack of FCC jurisdiction over a foreign carrier's activities in its home country).

56 See Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 557 (7th Cir. 1985); see generally Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957); Foley Brothers v. Filardo, 336 U.S. 281, 285-86 (1949); Independent Union of Flight Attendants v. Pan American World Airways, Inc., 923 F.2d 678, 680 (9th Cir. 1991); CFTC v. Nahas, 738 F.2d 487, 493 (D.C. Cir. 1984). Further, regulating single-end foreign resale activities would contravene the established doctrine that federal statutes will be construed to be consistent with international law. See Restatement (Third) of Foreign Relations Law, §§ 402 & 403 (1987).

carriers in foreign countries subject to foreign regulatory authorities, the Commission lacks jurisdiction to regulate single-end foreign resale activities.

Moreover, there is no basis in the Communications Act for "sharing" jurisdiction over carriers and services with foreign authorities. To the extent the Commission has jurisdiction over "interstate and foreign communication[s]" under Section 2(a) of the Communications Act, such jurisdiction is plenary and exclusive.[57] Foreign countries also exercise plenary and exclusive jurisdiction over the activities of carriers in their own countries. Established considerations of international comity also militate against asserting jurisdiction over the foreign half-circuit provider.[58]

In the AT&T Order, the Bureau declined to require the foreign carrier to obtain separate Section 214 authority,[59] instead imposing that requirement upon the already-authorized U.S. half-circuit provider. However, the Commission does not have jurisdiction to do indirectly what it cannot do directly, namely, regulate the services provided by foreign carriers to foreign end users subject to foreign laws. Moreover, it would open Pandora's

57 47 U.S.C. § 152(a); see IT&E Overseas, Inc., 7 FCC Rcd 4023, 4024 & n.15 (1992); Operator Services Providers of America, 6 FCC Rcd 4475, 4476 (1991); Midwest Corp., 38 FCC 2d 897, 898 (1973).

58 E.g., AT&T Co., 98 FCC 2d 440, 462 (1984).

59 In so doing, the Bureau side-stepped the question of whether foreign carriers are "connecting carriers" within the meaning of Section 2(b)(2) of the Communications Act. See 47 U.S.C. § 152(b); Western Union Telegraph Co., 75 FCC 2d 461, 473, 476 (1979).

box for the Commission to seek to regulate single-end foreign resale services through Section 214 requirements imposed upon the U.S. half-circuit provider. Based upon that precedent, foreign countries could be more aggressive than at present in seeking to regulate services provided by U.S. carriers to U.S. end users within the United States through regulations imposed upon foreign half-circuit providers. The result would be the same "collisions between domestic and foreign law" that Congress sought to avoid.

Further, subsection (a) of Section 214 cannot reasonably be construed to require U.S. carriers to obtain separate and additional authority for existing authorized capacity depending upon what services are provided, and how such services are provided, by the foreign carrier to customers at the foreign end. Single-end foreign resale does not constitute the construction of a new line or extension of an existing line, nor does it affect how the U.S. carrier "operate[s]" any line, within the meaning of Section 214. Indeed, the Commission's theory that the activities of the foreign half-circuit provider require the U.S. carrier to obtain separate Section 214 authority proves too much. If true, it would require each U.S. carrier to obtain separate Section 214 authority whenever it entered into a correspondent relationship with a foreign carrier, or when the foreign carrier sought to add new services. There is no way the Commission can interpret Section 214 to require U.S. carriers to obtain separate authority when the foreign carrier provides one particular service (i.e., single-end foreign resale) but not other services (e.g., non-interconnected IPL service or international message telephone services).[60]

2. Execunet. The Commission may not impose post hoc restrictions upon the services which a U.S. carrier may provide over facilities for which that carrier has already received Section 214 authorization. In the Execunet decision,[61] the Court held that a carrier may provide any services over its own authorized facilities unless the Commission imposes an express prohibition under Section 214(c) based on an affirmative finding that such services would not promote the public interest. As the Commission itself has noted:

> "Th[e] court [in Execunet] rejected the premise that a carrier is not entitled to offer services that were not contemplated at the time its facility applications were granted and decreed that a Section 214(a) authorization permits a carrier to offer any service which the authorized facility can be used to provide in the absence of a Section 214(c) condition that expressly prohibits the use of a facility to provide a particular service."[62]

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60 The Commission does not have authority to forbear from applying Section 214 to all services of the foreign carrier other than single-end resale. See MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223 (1994) (holding that the Commission does not have statutory authority to forbear from requiring non-dominant domestic common carriers to file tariffs under Section 203).

61 MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977) [hereinafter "Execunet"].

62 MTS and WATS Market Structure, 75 FCC 2d 644, 648 (1980).

Further, Section 214(c) applies only to conditions which are imposed "upon issuance of the certificate."[63] The Commission does not have authority to modify Section 214 certificates without a hearing on a post hoc basis through rulemaking.

Conclusion

For the foregoing reasons, IDB submits that the Commission should not expand the scope or application of the IPL resale policy or, alternatively, that any policies or definitions codified in this proceeding be applied on a prospective basis only.

Respectfully submitted,

IDB COMMUNICATIONS GROUP, INC.

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April 11, 1995

Its Attorneys

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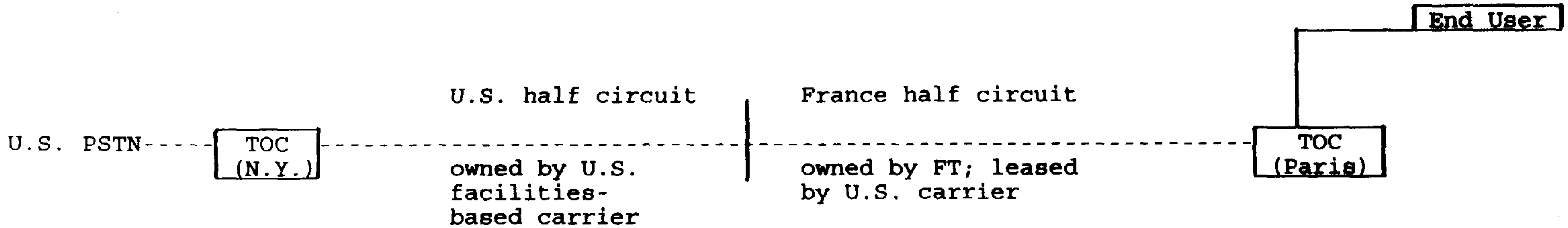
63 47 U.S.C. § 214(c).

EXHIBIT 1

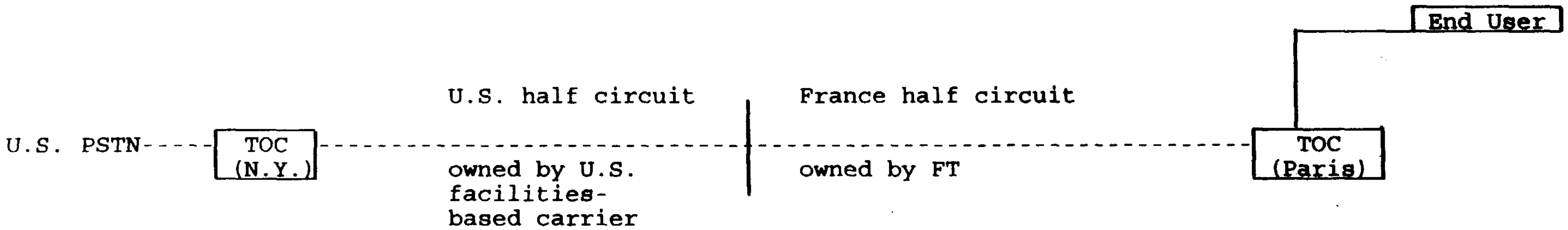
IMPERMISSIBLE CONFIGURATION*

Service offered to end-user in France by U.S. carrier leasing capacity from France Telecom for French half-circuit, and corresponding with U.S. facilities-based carrier for the U.S. half-circuit



PERMISSIBLE CONFIGURATION*

Service offered to end-user in France by France Telecom for French half-circuit, and corresponding with U.S. facilities-based carrier for the U.S. half-circuit



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* Permissible or impermissible according to the rules proposed in the Notice.

CERTIFICATE OF SERVICE

I, Ann Shubert, hereby certify that I have caused a copy of the foregoing "Comments of IDB Communications Group, Inc." to be served on this 11th day of April, 1995, by U.S. mail, first class postage prepaid, upon the following:

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